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this Memorandum Decision shall not be  
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establishing the defense of res judicata,  
collateral estoppel, or the law of the case.**

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF B.D.	)	
	)	
RAY DEARTH,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0611-JV-1037
	)	
MARION COUNTY DEPARTMENT	)	
OF CHILD SERVICES,	)	
	)	
Appellee-Petitioner.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Geoffrey Gaither, Magistrate  
Cause No. 49D09-0606-JC-26563

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**June 20, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellant-Respondent Ray Dearth (“Father”) appeals the finding that his infant son, B.D., is a Child in Need of Services (“CHINS”). We affirm.

## **Issue**

Father presents a single issue for review: whether the trial court committed reversible error by excluding testimony from a home-based counselor.

## **Facts and Procedural History**

On June 26, 2006, Jamie Haymaker (“Mother”), who was then Father’s girlfriend and is now his wife, contacted the Beech Grove Police Department regarding their then two-month-old son B.D. Because of his suspicions that Mother had been using drugs, Father had kept B.D. away from her for two days. Mother had then located B.D. and taken him without Father’s knowledge, but sought police assistance in obtaining B.D.’s infant seat.

During the ensuing investigation, Mother stated that she and Father were drug users and that she had contacted three hospitals earlier that day in an effort to enter a drug rehabilitation program. Officer Kelly Spivey interviewed Father and found his behavior “erratic” and “jittery.” (Tr. 41.) He appeared unable to sit still, concentrate, or finish sentences. Officer Spivey formed an opinion that Father was in drug withdrawal. Father admitted to drug use, but did not provide a specific time frame.

On June 27, 2006, the trial court authorized the filing of a CHINS petition by the Marion County Department of Child Services (“DCS”). B.D. was initially placed with a relative and later placed in foster care. Father’s paternity was established, and Mother and Father married shortly after B.D.’s removal from their care. They each began substance

abuse treatment/education programs.

On October 10, 2006, the trial court conducted a fact-finding hearing, found B.D. to be a CHINS and continued his placement in foster care. Father now appeals.<sup>1</sup>

### **Discussion and Decision**

Indiana Code Section 31-34-1-1 provides:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

The DCS had the burden of proving by a preponderance of the evidence that B.D. was a child in need of services according to the above statute. In re E.M., 581 N.E.2d 948, 952 (Ind. Ct. App. 1991), trans. denied.

At the fact-finding hearing, after the DCS and the parents had each presented their evidence and rested, Father's counsel moved to re-open the proceedings so that he could call home-based counselor Kelly Ford ("Ford") as a witness. Ford testified that the DCS assigned her to provide in-home counseling to Mother and Father, and "so far it has gone really well." (Tr. 76.) DCS moved to exclude "any testimony by Ms. Ford" on grounds that "she has no

person[al] knowledge of the facts and circumstances as they existed at the time of the filing of the petition.” (Tr. 77.) The trial court agreed that only “what was going on at the time of the petition” was relevant. (Tr. 77-78.) After brief argument, Father then rested his case without making an offer of proof.

Father now contends that he was denied due process. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Hite v. Vanderburgh Co. OFC, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006). Procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to a potential subsequent termination of parental rights. In re J.Q., 836 N.E.2d 961, 966 (Ind. Ct. App. 2005), reh’g denied. Here, however, we are confronted with a restriction upon the elicitation of evidence from a single witness called after Father had initially rested his case. Father’s challenge is one of exclusion of evidence. Error in the admission or exclusion of evidence will not result in reversal on appeal “unless refusal to take such action appears to the court inconsistent with substantial justice.” Ind. Trial Rule 61.

In CHINS proceedings, the relevant evidence may include evidence of changes in circumstances occurring after the filing of the CHINS petition. See In the Matter of C.S., 863 N.E.2d 413, 418 (Ind. Ct. App. 2007) (holding that the trial court should consider the parent’s situation at the time the case was heard by the court), trans. denied. See also Matter of D.T., 547 N.E.2d 278, 284 (Ind. Ct. App. 1989), reh’g denied, trans. denied (“[A]n adjudication that a child is dependent and neglected may not be based solely on conditions

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<sup>1</sup> Mother is not an active party to this appeal.

which existed in the distant past, but exist no longer.”) Accordingly, Father would properly have been allowed to present testimony from Ford regarding his situation at the time of the fact-finding hearing.

In light of Ford’s testimony that counseling had “gone really well” and Mother’s testimony that Ford had no complaints about the parents’ residence apart from missing window screens, presumably further testimony from Ford elaborating upon these observations would have been favorable to the parents. Nevertheless, no offer of proof was made and we cannot speculate that Ford’s testimony would have been so compelling as to overcome the evidence that Father and Mother were still in the process of completing substance abuse services.

B.D. was removed from the parents’ care due to their drug use and need for rehabilitative treatment. At the time of the fact-finding hearing, Mother had completed the out-patient portion of her drug treatment and was to begin the after-care portion. She had missed five out of eleven sessions during the previous month. Father was still in the process of completing his drug treatment/education program.

Even assuming that Ford’s testimony would have been entirely complimentary of the parents’ efforts, we are not persuaded that the trial court would have immediately ordered the reunification of an infant with two parents having a history of drug abuse pending the completion of their drug treatment programs. As such, the exclusion of further testimony from Ford is harmless error.

Affirmed.

SHARPNACK, J., and MAY, J., concur.